Mohamad Azizan bin Ibrahim Mustapha v Chung Nyong Khiong

HIGH COURT (KUCHING) — CIVIL APPEAL NO KCH-12B-10/8 OF 2015
ALWI ABDUL WAHAB JC
4 FEBRUARY 2016

Tort — Negligence — Road accident — Motorcyclist lost leg following accident with car and lorry — Whether motorcyclist's version of how accident took place not plausible — Whether his police report, statement of claim and witness statement at trial offered three contradictory versions of accident — Whether trial court found evidence of drivers of car and lorry as to how accident took place more probable — Whether court found accident caused solely by motorcyclist's failure to keep proper look-out when overtaking vehicles — Whether general damages awarded by trial court for scarring appropriate but award for cost of second prosthesis had to be set aside for not being strictly proven

The appellant sued the respondent and two other defendants ('D2' and 'D3') in the sessions court for damages arising from a road accident which caused the loss of his right leg. The appellant entered into a consent judgment with D2 and D3 and the trial proceeded only against the respondent. At the material time, the appellant was riding a motorcycle and travelling in the same direction as the respondent, who was driving a car. D2 was the driver, and D3 the owner, of a lorry which was travelling in the opposite direction. The trial judge dismissed the appellant's claim, believing the respondent's version of how the accident took place and holding that the appellant's version of the accident was inconsistent with his police report and his pleading. In his police report, lodged 16 days after the accident, the appellant said that while he was overtaking the respondent's car, he grazed against it and thereby lost control of his motorcycle, encroached into the lorry's path and collided into it. In his statement of claim, however, the appellant said the respondent's car collided into him and the impact sent him and his motorcycle into the lorry's path. In his witness statement at the trial, the appellant made a third contention, ie that his motorcycle was hit from the rear by the respondent's car which he had just overtaken and the impact sent him and his motorcycle into the lorry's path. The respondent and D2, however, testified that when he was overtaking vehicles, the appellant encroached into the lorry's path and slammed into the right front part of the lorry, which impact caused the motorcycle to ricochet against the respondent's car on its right front side and rear back door. The appellant appealed against the dismissal of his claim whilst the respondent cross-appealed against the trial court's awards of RM10,000 for scarring and RM15,000 for the cost of a second prosthesis.

Held, dismissing the appellant's appeal, affirming the RM10,000 awarded for scarring but setting aside the RM15,000 awarded as cost of the second prosthesis:

(1) On balance of probabilities, the appellant failed to prove that the respondent was negligent. It was the court's view that the accident was caused solely by the appellant's failure to keep a proper look-out to ensure the road was clear before overtaking the respondent's car. The appellant was in the process of overtaking the car when his motorcycle collided with the lorry. He had not completed overtaking the car. His case that his motorcycle was hit from behind was without basis as the damage to the motorcycle was at the left and right side as described in his police report. If the appellant's allegation was true that the motorcycle was hit from behind by the car, the damage would have been centred at the back of the motorcycle and, if it was true that he was hit from behind, the appellant should have reported that material fact in his police report but he did not (see paras 26 & 31).

(2) There was no mention in the appellant's police report of any wrongdoing by either the respondent or D2. There was also no mention that the motorcycle was already in front of the respondent's car when it was nudged from behind. The suggestion that the motorcycle was nudged from behind by the respondent's car was incredulous and it only came out now when it should have been reflected in the police report as the appellant's memory of the accident was still fresh then. This material fact was also omitted in the appellant's statement of claim but was only revealed in his witness statement five years after the accident took place (see para 19).

(3) There was a clear contradiction between the appellant's police report and his witness statement. In the latter, he said his motorcycle was already in front of the respondent's car when it knocked him which meant he had completely overtaken the car (see para 21).

(4) The evidence of the respondent and D2 was consistent in all material particulars. The respondent's police report was lodged on the same day of the accident and remained the same as appeared in his witness statement. Specifically, at paras 4 and 5 of his witness statement, he said that after the motorcycle and lorry collided, the motorcycle ricocheted back and hit the respondent's car on the front right side and rear back door on the right side. As such, the trial judge was correct in finding that the respondent's version of how the accident happened was more probable. Similarly, D2 lodged his police report on the same day of the accident and in court he maintained his story that the motorcycle encroached into his path and knocked into the right front part of the lorry (see paras 24–25).

(5) The court could not find fault with the trial judge's reasoning in awarding RM10,000 for scarring because there would definitely be scars due to surgery and injuries which were permanent. Special damages, however, had to be strictly proven and as the appellant failed to substantiate his claim with documentary proof that he had incurred RM15,000 for the second prosthesis, the award in respect of this head of claim was set aside (see paras 36 & 38–39).

[Bahasa Malaysia summary

Perayu menyaman responden dan dua defendan lain ('D2' dan 'D3') di mahkamah sesyen untuk ganti rugi berbangkit daripada satu kemalangan jalan raya yang menyebabkan kehilangan kaki kanannya. Perayu memasuki penghakiman persetujuan dengan D2 dan D3 dan perbicaraan diteruskan hanya terhadap responden. Pada masa material, perayu menunggang motosikal dan bergerak dalam arah yang sama dengan responden yang memandu kereta. D2 adalah pemandu dan D3 pemilik sebuah lori yang dalam perjalanan ke arah yang bertentangan. Hakim perbicaraan menolak tuntutan perayu, mempercayai versi responden tentang bagaimana kemalangan itu berlaku dan memutuskan bahawa versi kemalangan perayu itu tidak konsisten dengan laporan polis dan plidingnya. Dalam laporan polisnya yang dibuat 16 hari selepas kemalangan tersebut, perayu berkata bahawa dia cuba memintas kereta responden, dia bergesel dengan kereta responden tersebut dan dengan itu hilang kawalan terhadap motosikalnya, menceroboh laluan lori dan berlanggar dengan lori. Dalam penyataan tuntutannya, bagaimanapun, perayu berkata kereta responden melanggarnya dan impak tersebut menghantarnya dan motosikalnya ke laluan lori tersebut. Dalam penyataan saksinya pada perbicaraan tersebut, perayu membuat hujahan ketiga, iaitu bahawa motosikalnya dilanggar dari belakang oleh kereta responden yang baru sahaja dipintas dan impak tersebut menghantarnya dan motosikalnya laluan lori tersebut. Responden dan D2, bagaimanapun, memberi keterangan bahawa apabila dia cuba memotong kenderaan, perayu menceroboh laluan lori dan merempuh bahagian hadapan kanan lori, di mana impak tersebut menyebabkan motorsikal tersebut terpelanting ke kereta responden di bahagian depan kanan dan pintu belakang. Perayu merayu terhadap penolakan tuntutannya manakala responden mengemukakan rayuan balas terhadap keputusan mahkamah perbicaraan sebanyak RM10,000 untuk parut dan RM15,000 untuk kos prostesis kedua.

Diputuskan, menolak rayuan perayu, mengesahkan RM10,000 yang diawardkan untuk parut tetapi mengetepikan RM15,000 yang diberikan sebagai kos prostesis kedua:

(1) Atas imbangan kebarangkalian, perayu gagal untuk membuktikan bahawa responden telah cuai. Mahkamah berpandangan bahawa kemalangan tersebut hanya disebabkan oleh kegagalan perayu untuk

melihat keluar untuk memastikan jalan raya adalah jelas sebelum memotong kereta responden. Perayu adalah dalam proses memintas kereta apabila motosikalnya bertembung dengan lori. Dia tidak selesai memintas kereta tersebut. Kesnya bahawa motosikalnya dilanggar dari belakang adalah tidak berasas kerana kerosakan pada motosikal berada di sebelah kiri dan kanan seperti yang dinyatakan dalam laporan polisnya. Jika dakwaan perayu adalah benar bahawa motosikal tersebut dilanggar dari belakang oleh kereta tersebut, kerosakan itu sepatutnya berpusat di belakang motosikal dan, jika benar bahawa dia dilanggar dari belakang, perayu sepatutnya melaporkan bahawa fakta material dalam laporan polisnya tetapi dia tidak melakukannya (lihat perenggan 26 & 31).

(2) Tidak disebut dalam laporan polis perayu mengenai apa-apa salah laku sama ada oleh responden atau D2. Tidak juga disebut bahawa motosikal tersebut sudah berada di hadapan kereta responden apabila motorsikal tersebut disondol dari belakang. Cadangan bahawa motosikal tersebut disondol dari belakang oleh kereta responden adalah meragukan dan hanya dikeluarkan sekarang apabila ia sepatutnya telah digambarkan dalam laporan polis memandangkan memori perayu berhubung kemalangan tersebut masih segar. Fakta material ini juga ditinggalkan dalam penyata tuntutan perayu tetapi hanya didedahkan dalam penyataan saksinya lima tahun selepas kemalangan itu berlaku (lihat perenggan 19).

(3) Terdapat percanggahan yang jelas antara laporan polis perayu dan penyataan saksinya. Dalam penyataan saksinya, dia mengatakan bahawa motosikalnya sudah di hadapan kereta responden apabila kereta tersebut menolaknya yang bermakna dia telah memotong kereta tersebut sepenuhnya (lihat perenggan 21).

(4) Keterangan responden dan D2 adalah konsisten dalam semua butir-butir material. Laporan polis responden telah dibuat pada hari yang sama dengan kemalangan tersebut dan kekal sama seperti dalam kenyataan saksinya. Secara spesifik, di perenggan 4 dan 5 penyataan saksinya, dia mengatakan bahawa selepas motosikal dan lori bertembung, motosikal terpelanting semula dan melanggar kereta responden di pintu depan sebelah kanan dan pintu belakang di sebelah kanan. Oleh itu, hakim perbicaraan bertindak tepat dalam membuat dapatan bahawa versi responden bagaimana kemalangan itu berlaku adalah lebih berkemungkinan. Begitu juga, D2 membuat laporan polis pada hari yang sama dengan kemalangan tersebut dan di mahkamah dia mengekalkan cerita bahawa motosikal tersebut menceroboh ke laluannya dan melanggar bahagian depan kanan lori (lihat perenggan 24–25).

(5) Mahkamah tidak dapat mencari kesalahan dengan hujah hakim perbicaraan dalam mengawardkan RM10,000 untuk parut kerana pasti ada parut akibat pembedahan dan kecederaan yang kekal. Ganti rugi

khas bagaimanapun, perlu dibuktikan dengan tegas dan memandangkan perayu gagal menyokong dakwaannya dengan bukti dokumentari bahawa dia telah menanggung RM15,000 untuk prostesis kedua, award berhubung dengan tuntutan utama ini telah diketepikan (lihat perenggan 36 & 38–39).]

Notes

For cases on road accident, see 12(1) and 12(2) *Mallal's Digest* (5th Ed, 2015) paras 1790–2092.

Cases referred to

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)

Wong Thin Yit v Mohamed Ali [1971] 2 MLJ 175, FC (refd)

Sarbjit Singh Khaira (Joseph Kahel Baling with him) (Khaira & Co Advocates) for the appellant.

Desmon Sahathevan (Irene Ho with him) (Battenberg & Talma Advocates) for the respondent.

Alwi Abdul Wahab JC:

INTRODUCTION

[1] This is an appeal by the appellant (the plaintiff in the sessions court) against the decision given by the learned sessions court judge ('the trial judge') in favour of the respondent (the first defendant in the sessions court) after a full trial in an accident case which occurred along Jalan Siol Kanan, Kuching. In this judgment, I shall refer the appellant and the respondent as the plaintiff and the first defendant respectively as in the original action. The plaintiff had entered consent judgment against the second defendant and the third defendant in the sessions court. The second defendant ie Chua John was called as witness ('DW2') for the first defendant before the trial judge.

[2] The trial judge disbelieved the plaintiff's version as to how the accident occurred by holding that his evidence is inconsistent with his police report and the pleading. On the other hand, the trial judge believed the first defendant's evidence on how the accident occurred on that fateful day. Hence, he dismissed the plaintiff's claim with costs of RM8,000 to be paid to the first defendant.

THE FACTS

[3] On the 1 December 2010, at about 2.45pm an accident occurred along Jalan Siol Kanan, Kuching involving a motorcycle registration No QKX 1257 ('the motorcycle') ridden by the plaintiff, a Perodua Kancil registration No QAC 2539 ('the Kancil') driven by the first defendant and a lorry registration No QAH 1787 ('the lorry') driven by DW2. The third defendant is the owner of the lorry. The accident had caused serious injuries to the plaintiff who lost his right leg as a result, while the first defendant and DW2 escaped unscathed.

[4] It is undisputed facts that at the time of the accident, the motorcycle and the Kancil were travelling in the Kuching direction and the lorry was travelling from the opposite direction towards Taman Sukma Petra Jaya.

THE PLAINTIFF'S CASE

[5] The accident happened when the Kancil collided into the motorcycle while the said motorcycle was in front of the Kancil. The impact of the said collision caused the plaintiff's motorcycle to be pushed to the right side of the road and collided with the lorry traveling from the opposite direction. Based on the plaintiff's evidence, the accident occurred on the Kancil's path of travel ie the first collision followed by the second collision between the motorcycle and the lorry on the lorry's path of travel.

[6] The plaintiff's police report ('exh P4') on how the accident happened is stated as follows:

> ... Saya telah memotong sebuah motokar jenis produa kancil plet no: QAC 2539 ketika itu berada di depan saya. Masa memotong kenderaan saya telah bergesil dengan motokar tersebut, lalu hilang kawalan dan terus masuk kelaluan bertentangan dan berlanggar dengan lori plet QAH 1787 ...

[7] Mr Sabjit, learned counsel for the plaintiff submitted that the trial judge had fallen into error and misdirected himself in holding that the plaintiff had given up to three versions of how the accident happened ie his police report, statement of claim and witness statement. It was submitted that the plaintiff's police report exh P4 confirmed that there is only one version of the accident ie the said Kancil collided into the motorcycle while the motorcycle was in front of the Kancil causing the motorcycle to lose control and pushed to the right side of the road and colliding with the lorry coming from the opposite direction.

[8] The plaintiff further submitted that the plaintiff's statement of claim is based on the police report that there is only one version of the accident ie the motorcycle collided by the Kancil while the motorcycle was in front of the

Kancil causing the motorcycle to lose control to the right side of the road and colliding with the lorry on the opposite side of the road.

[9] The plaintiff's statement of claim (p 5 of the appeal record) stated as follows:

> 4. On the material day, the Plaintiff was riding the said motorcycle along Jalan Siol Kanan, Kuching in the direction of Kuching when the said motorcycle was collided into by the said car, driven by the 1st Defendant and was travelling in the same direction as the Plaintiff. The impact of the said collision caused the Plaintiff and the said motorcycle to be push to the right side of the said road where upon the Plaintiff was collided into by the said lorry which was traveling in the opposite direction.

[10] It was also the plaintiff's submission that the plaintiff's witness statement is consistent with the statement of claim and the police report exh P4 in that there is only one version of the accident ie the said motorcycle collided by the Kancil while the motorcycle was in front of the Kancil causing the motorcycle to lose control and moved to the right side of the road and colliding with the lorry on the opposite side of the road.

[11] The plaintiff's witness statement (p 215 of the appeal record) stated as follows:

> 3. How did the said accident occur?
>
> On 01.12.2010 at about 2.45p.m., I was riding a motorcycle bearing registration number QAX 1257 along Jalan Siol Kanan, Kuching in the direction of Kuching when the said motorcycle was collided from the rear by a vehicle registration number QAC 2539 (the said car), which was travelling in the same direction as me and I had just overtaken. The impact of the said collision caused me and the said motorcycle to be push to the right side of the said road where the I was collided into by a vehicle registration number QAH 1787(the said lorry) which was traveling in the opposite direction.

[12] The plaintiff submitted that the first collision occurred when the Kancil collided into the rear of the motorcycle on the Kancil's lane and this is supported by the fact that the glass debris were marked and referred to with point 'X' in the sketch plan (exh P3 at p 349 of the appeal record).

THE FIRST DEFENDANT'S CASE

[13] Mr Desmond, learned counsel for the first defendant submitted that based on the evidence of the first defendant and DW2 the accident was caused by the motorcycle when it collided into the lorry travelling from the opposite direction. As the result of the said collision, the motorcycle hit the Kancil on

the front side and rear back door on the right side of the Kancil (paras 4 and 5 of the first defendant's witness statement (p 222 of the appeal record).

[14] DW2's testimony also confirmed this sequence of how the collision happened. According to DW2, the first collision happened when the motorcycle encroached into the lorry's path and knocked into the right front part of the lorry. Upon the impact the motorcycle lost control and ricochet back into the first defendant's lane and hit the Kancil. The first collision happened in the said lorry's path of travel and the second collision happened in the lane where the Kancil is travelling (pp 192–194 of the appeal record).

[15] The first defendant also testified in court that the motorcycle had not yet overtaken his Kancil (p 169 of the appeal record). The first defendant's evidence was confirmed by DW2 in his evidence during examination-in-chief that the motorcycle was in the process of overtaking three vehicles from the opposite lane (p 192 of the record of appeal).

[16] DW2 further testified in examination-in-chief that when the first collision happened between the motorcycle and his lorry, the motorcycle had not completed overtaking the Kancil. DW2's evidence at pp 193–194 of the appeal record is reproduced below:

Q:	When was the first time you saw the motorcycle?
A:	The first time I saw the motorcycle was when it was in the process of overtaking vehicles at a fast speed.
Q:	When was the first time you saw the Kancil?
A:	I saw the Kancil when the Motorcycle was overtaking the vehicles.
Q:	Has the motorcycle completed overtaking when the first collision between the motorcycle and your Lorry happen?
A:	No.

(pp 193–194 of the appeal record).

[17] It was also the first defendant's submission that the damage to the Kancil was at the right front part near the headlamp and also the right side of the rear door. There were no broken glasses to the damage of the Kancil. On the other hand, the said lorry was damaged to the right footrest and the signal light was broken. The glass debris can be seen at point marked 'X' in the sketch plan (p 349 of the appeal record) on the Kancil's lane. The first defendant submitted that the point marked 'X' is not consistent with the damage to the Kancil and the lorry after the first and second collisions.

[18] The first defendant further submitted that there was no explanation given as to where the broken glasses of the lorry went to. Other than the sketch plan, there is no photographs nor chemist report to assist the court to determine whether the glass debris found on the road at point marked 'X' belong to the Kancil or the lorry.

THE FINDINGS OF THE COURT

[19] The police report (exh P4) was lodged by the plaintiff on 17 December 2010 which was 16 days after the accident. In that police report there was no mention of any wrongdoing of either the first defendant (the driver of the Kancil) or DW2 (the driver of the lorry). There was also no mention that the motorcycle was already in front of the Kancil when it was nudged from behind. In my view the suggestion that the motorcycle was nudged from the rear by Kancil is so incredulously illogical that it only came out now when it should have been reflected in exh P4 upon lodging the police report as his memory on the accident is still fresh. This material fact was also omitted in the plaintiff's statement of claim filed on 29 November 2013 but only revealed in his witness statement after five years later since the accident took place.

[20] Although the words used by the plaintiff in exh P4 ie 'Saya telah memotong sebuah motokar jenis produa kancil plet no: QAC 2539 ketika itu berada di depan saya', which literally means that the act of overtaking had been completed, reading the plaintiff's statement further ie 'Masa memotong kenderaan saya telah bergesil dengan motokar tersebut, lalu hilang kawalan dan terus masuk kelaluan bertentangan dan berlanggar dengan lori plet QAH 1787 ...' which clearly means that the plaintiff was in the process of overtaking and in that process it grazing with Kancil causing the motorcycle to lose its balance and pushed to the opposite direction collided into the lorry QAH 1787.

[21] In my view, there is a clear contradiction between the plaintiff's police report and his witness statement that in the latter he stated his motorcycle was already in front of the Kancil when it knocked at him which means that he had overtaken the Kancil completely.

[22] The plaintiff relied on the evidence of the assistant investigating officer ('PW1') to support his case that there were in fact three collisions: firstly, the Kancil collided into the motorcycle when he was in front of the Kancil; secondly, the motorcycle collided with the Lorry after being nudged by the Kancil; and thirdly, the motorcycle ricochet back and collided against the Kancil. Again, I must mention here that the material fact of the third collision does not appear in exh P4 neither it appears in the plaintiff's statement of claim.

[23] With due respect, PW1 did not witness the accident but his evidence was based merely on his observation and investigation at the scene. He arrived at the scene at 6.30pm few hours later after the accident only to find out that all the vehicles involved in the accident had already been removed. In fact PW1 was quite frank by admitting that he could not recall on certain matter about the accident (p 81 of the appeal record).

[24] On the other hand, I found that the evidence of the first defendant and DW2 were consistent in all material particulars. The first defendant's police report was lodged on the same day of the accident (p 342 of the appeal record) and remained the same as appeared in his witness statement. Specifically, at paras 4 and 5 of his witness statement, he stated that after the collision between the motorcycle and the lorry, the motorcycle ricochet back and hit the Kancil on the front right side and rear back door on the right side of the Kancil. As such, the trial judge was correct in his findings that the first defendant's version on how the accident happened was more probable.

[25] Similarly DW2's police report (p 343 of the appeal record) lodged on the same day of the accident stating how the accident happened. In the court, DW2 maintained his story that the motorcycle had encroached into his path of travel and knocked into the right front part of the lorry (pp 192–193 of the appeal record).

[26] It is my view that the accident at Jalan Siol Kanan was caused solely by the plaintiff for failure to keep a proper look out to ensure that the road is clear before overtaking the Kancil in front. The plaintiff was in the process of overtaking the Kancil when his motorcycle collided into the lorry. He had not completed overtaking the Kancil. The plaintiff's case that the motorcycle was hit from behind was without basis as the damage to the motorcycle was at the left and right side as described in exh P4. If the plaintiff's allegation is true that the motorcycle was hit from behind by Kancil, the damage to the motorcycle should have been centered at the back of the motorcycle and if it is true that he was hit from behind, he should have reported this material fact in exh P4 but did not.

[27] I also cannot faulted the trial judge when he came to his findings that the first defendant had not breached his duty of care as he was driving on his proper side of the road. He cannot be expected to predict and expect what the intentions and actions of the plaintiff who was travelling behind him. Furthermore, the plaintiff had not given any signal or honked at the first defendant to indicate that he wanted to overtake the Kancil. It was the plaintiff's own dangerous manner of riding the motorcycle in an attempt to

overtake the Kancil and in doing so had encroached into the path of an oncoming lorry that led to the series of collisions (para 26 at p 60 of the appeal record).

WHETHER DW2 IS AN INDEPENDENT WITNESS

[28] Learned counsel for the plaintiff claimed that DW2 is not an independent witness because prior to this DW2 and third defendant had filed a claim against the first defendant and consent judgment was entered between the first defendant and DW2 and the third defendant. With due respect, I do not agree with him. There was no admission of liability by any party to the consent judgment. The effect of the consent judgment was that there be no further claim by any parties against DW2 and the third defendant and DW2 and the third defendant against the plaintiff and the first defendant regardless of the final adjudication by the court on liability, quantum and costs. Further, pursuant to para 3 of the consent judgment, the notice of claim of DW2 and the third defendant against the first defendant dated 24 February 2014 was withdrawn with no order as to costs.

[29] In my view, DW2 had no interest in the present action since the matter had been settled between the plaintiff and DW2 and third defendant. The outcome of the present case shall have no effect on DW2 in any event. After all DW2 is the material witness who was the driver of the lorry, surely he is the best person to give evidence and to assist the court to find out who caused the accident. The mere filing of notice of claim by DW2 and the third defendant against the first defendant does not mean that the first defendant is at fault for causing the said accident. This is not an issue for the court's consideration.

THE DAMAGE TO THE KANCIL AND THE LORRY

[30] Mr Sarbjit submitted that the collision occurred on the Kancil's path as the glass debris were found at point marked 'X' by PW1 in the sketch plan. Based on his investigation, PW1 also told the court that the glass debris came from the Kancil (p 90 of the appeal record). However, the evidence was laid that there was no broken glasses from Kancil but the right signal light of the lorry was broken. The glass debris were not sent to the chemist to determine from which vehicle they were belong to. I could not therefore assumed that the glass debris at point 'X' belonged to the Kancil in view that there were no broken glasses coming from the Kancil and this was admitted by first defendant being the owner of Kancil in his police report. The glass debris could have been swept away from the original position since the vehicles were also removed before the arrival of PW1 at the scene. I agree with the trial judge that there was an omission on the part of PW1 to give proper explanations on the whereabout of the broken glasses coming from the lorry.

[31] In an action for negligence, the onus of proof rests wholly on the plaintiff. In the present case, I find that the plaintiff has failed to prove the first defendant's negligence on the balance of probabilities (*Wong Thin Yit v Mohamed Ali* [1971] 2 MLJ 175).

[32] It is the established principle of law that the appellate court would not disturb the factual findings of the court below where the conclusions reached to a large extent, depended on the credibility of the witnesses and the impression formed by the court which has seen them and judged their honesty and accuracy (*China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163).

[33] Based on all the above reasons, I dismissed the plaintiff's appeal and affirmed the decision of the trial judge on liability.

THE FIRST DEFENDANT'S CROSS-APPEAL ON QUANTUM BASED ON 100% LIABILITY

[34] The first defendant has filed a notice of cross-appeal dated 17 September 2015 (encl 2) against part of the decision of the trial judge in respect of the award given for general damages (scarring due to surgery and injuries) and that of the award given for special damages (cost of prosthesis).

General damages – Scarring due to surgery and injuries

[35] The trial judge awarded the plaintiff RM10,000 for scarring due to surgery and injuries. The counsel for the first defendant submitted that there was no evidence given in court pertaining to the scarring and neither was it stated in the plaintiff's medical report from Sarawak General Hospital, Kuching.

[36] The trial judge gave his reasons why he awarded the sum of RM10,000 for scarring because there will definitely be scars due to surgery and injuries ie amputation of right leg and wiring of fracture proximal phalanx right little finger. These injuries are permanent. I cannot find fault with these reasons and accordingly affirm the award.

Special damages – Cost of prosthesis

[37] The trial judge awarded the sum of RM15,000 as cost of the second prosthesis based on the plaintiff's evidence that he bought the second prosthesis because he was not comfortable using the first prosthesis given by the hospital. The award under this heading was given although there was no receipt

produced by the plaintiff and the trial judge believed the plaintiff's evidence based on the photographs of the two prosthesis (exhs P6(A) and (B)) shown in court.

[38] It is trite law that special damages must be specifically pleaded and strictly proven. The burden of proof lies on the plaintiff to prove each and every items claimed under special damages otherwise the figures are deemed plucked from the air and presented to court (*Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324). The plaintiff's father ie Ibrahim Mustapha (PW3) informed the court during cross-examination that he was not sure where the second prosthesis was bought from but it was sent by someone to his house (p 138 of the appeal record). He could not prove that he had paid for the second prosthesis.

[39] As the plaintiff failed to substantiate his claim with proper receipt and documentary proof that he had incurred RM15,000 for the second prosthesis, the claim under this heading is dismissed. The trial judge's decision in awarding the plaintiff the sum of RM15,000 is set aside.

CONCLUSION

[40] The plaintiff/appellant's appeal is dismissed with costs of RM20,000 to the first defendant/respondent for both here and the court below.

[41] The first defendant/respondent's cross-appeal on quantum based on 100% liability is allowed in partial as follows:

(a) the sum of RM10,000 for scarring due to surgery and injuries (general damages) awarded by the trial judge is affirmed; and

(b) the sum of RM15,000 for the second prosthesis (special damages) awarded by the trial judge is set aside.

Appellant's appeal dismissed, RM10,000 awarded for scarring affirmed but the RM15,000 awarded as cost of the second prosthesis set aside.

Reported by Ashok Kumar